

October 16, 2012

Crystal Jack
Kahn Soares & Conway, LLP
1415 L Street, Suite 400
Sacramento, CA 95814

Re: Request for Informal Assistance
Our File No. I-12-131

Dear Ms. Jack:

This letter responds to your request for advice regarding the “gift” provisions of the Political Reform Act (the “Act”).¹ Because your question is general in nature we are treating your request as one for informal assistance.²

Please note that the Commission does not provide advice on bodies of law outside the confines of the Act. Thus, we offer no opinion on the application of other laws, such as those regulating nonprofit organizations or incompatible activities and conflict-of-interest laws that might apply to the intended recipients of the educational program.

QUESTIONS

1. Would the gift of meals and travel associated with an informational tours provided to state legislators, legislative staff, regulators and regulatory staff be reportable as gifts?
2. Who would be reported as the source of the gifts of food and travel?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSIONS

1. The exception for informational materials does not apply to food and travel associated with the informational materials. Therefore, unless another exception applies, any transportation, meals, or lodging provided to these officials would be gifts and, depending on the circumstances, may be subject to the \$10 monthly limit on lobbyists and lobbying firms in making, acting as intermediaries for, or arranging gifts. In addition, gifts would be subject to the current \$420 annual limit on gifts from other sources such as lobbyist employers.

2. This would depend on the facts of how the gifts were solicited.

FACTS

You are a lobbyist who works for a lobbying firm and have a group of clients (lobbyists employers) who are interested in creating a nonprofit organization for the purpose of providing educational tours, including transportation and perhaps related meals and lodging, to state legislators, legislative staff, regulators and regulatory staff.

ANALYSIS

The term “gift” is defined in Section 82028(a) as: “[A]ny payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received....”

The Act regulates the receipt of gifts by legislators, legislative staff, and other public officials in three ways.

- First, the Act places limitations on the acceptance of gifts by certain public officials. Certain state and local officials are prohibited from accepting gifts from any single source in any calendar year with a total value of more than the gift limit. (Section 89503(a).) The current gift limit, which is adjusted biennially each odd number year to reflect changes in the Consumer Price Index, is \$420.
- Second, so that the public is made aware of any potential undue influences from donors who make gifts, the Act imposes reporting obligations requiring certain public officials to disclose the source of any gifts aggregating \$50 or more in value.
- Third, the Act prohibits any public official from making, participating in making, or using his or her official position to influence the outcome of a governmental decision involving the donor of a gift or gifts with an aggregate value of \$ 420 or more provided to, received by, or promised to the official within the 12 months prior to the date the decision is made. (Sections 87100, 87103(e), Regulations 18700, 18703.4; as to conflicts of interest and members of the Legislature, also see Sections 87102, 87102.5 and 87102.6.)

- Finally, the Act prohibits state-registered lobbyists and lobbying firms from making, acting as an intermediary for, or arranging gifts in excess of \$10 per month to, among others, legislators and specified legislative staff and officials who work in state agencies. (Sections 86201 and 86203; Regulation 18624.)

Informational Material Exception

Regardless of the source, not all goods and services supplied to program participants free of charge are necessarily “gifts.” The Act excludes from its definition of “gift” items classed as “informational material.” (Section 82028(b)(1) and Regulation 18942(a)(1).)

Section 82028(b)(1), however, specifically excludes from the “informational material” exception “travel and reimbursement for any expense” meaning that, generally, the costs of transportation, meals and lodging provided to an official as part of an informational tour are a gift. However, recognizing that there are some instances where transportation (as opposed to meals and lodging) may be integral to the conveyance of the information, the Commission has adopted Regulation 18942.1 to more fully describe the types of payments that fall into the exception. Regulation 18942.1 provides:

“ ‘Informational material’ means any goods or service that serves primarily to convey information and that is provided to the official for the purpose of assisting him or her in the performance of his or her official duties or the duties of the elective office he or she seeks. Informational material may include:

“(a) Books, reports, pamphlets, calendars, periodicals, photographs, audio and video recordings, flash drives, CD-ROMS, or DVD ROMS or other similar recordings, or free or discounted admission to informational conferences or seminars.

“(b) Scale models, pictorial representations, maps, and other such items, provided that when the item has a fair market value in excess of the gift limit amount specified in Regulation 18940.2, the burden shall be on the recipient to demonstrate that the item is informational material.

“(c) On-site demonstrations, tours, or inspections. Transportation provided to or in connection with an on-site demonstration, tour, or inspection is also considered ‘informational material’ when any of the following apply:

“(1) The transportation serves as the means by which the information is conveyed and is integral to the conveyance of the information, such as an aerial tour over an area.

“(2) The transportation is provided solely at the site of a demonstration, tour, or inspection, including to and from an area of that site that is legally inaccessible to the public.

“(3) The transportation is to or from a site when there is no reasonable, publicly-available commercial transportation available to that site and the transportation provided is limited to the segment for which public transportation is not available.”

Therefore, unless the transportation meets one of the narrow exceptions to the definition of “gift” (such as the exception for informational tours in Regulations 18942(a)(1) and 18942.1), payments made to send an official on those tours are considered gifts. Since you do not provide details on the informational tours about which you ask, we cannot give you specific advice on whether or not they would be gifts to the officials involved or whether you or your lobbying firm would be making, acting as an intermediary for, or arranging any gift in connection with the tours.

Other Gift Limit Exceptions

The Act and interpretative regulations provide numerous other exceptions. In addition, in some cases, a gift may be exempt from the \$420 gift limit, but still subject to reporting and potential disqualification by the official. (See e.g., Section 89506(a).) Since you do not provide details on the informational tours about which you ask or about the structure of the nonprofit entity or entities, you propose to form to pay for the tours, we cannot give you specific advice on whether or not the \$420 gift limit would apply to the officials involved. As your program is further developed you may want to seek additional advice.

Source of Gift

You have indicated that the gift payments from the nonprofit will be funded by private donors, your clients, who are lobbyist employers. Thus, you have asked whether the source of any particular gift to an official is the nonprofit, or the donor making a payment to the nonprofit for the gift.

Recently amended Regulation 18945 provides the Commission’s rule for determining the source of a gift and provides the following, in pertinent part:

“(a) The person who makes the gift to the official(s) is the source of the gift unless that person is acting as an intermediary. The person is acting as an intermediary for the source of the gift when the gift to the official was provided under any of the following conditions:

“(1) The person receives a payment from a source and the payment is made to the official after the source identifies the official as the intended recipient of the gift;

“(2) The person receives a payment from a source after soliciting the payment with the understanding that the payment will be used for the sole or primary purpose of making a gift to an official; or

“(3) The person receives a payment from a source after the payment was solicited by the official or the official's agent for the purpose of making a gift to the official.

“(b) Under any of the conditions identified in subdivision (a)(1)-(3), the source of the payment is the source of the gift.

“(c) If a public official's pro-rata share of the cost of the benefit provided at an event constitutes a gift to the official, the person hosting the event, unless the admission to the event was provided by someone other than the host, shall be deemed the source of the gift so long as the event is widely attended by persons other than governmental officials.

“(d) Presumption of Source by Official. Notwithstanding subdivision (a), an official may presume that the person delivering the gift or, if the gift is offered but has not been delivered, the person offering the gift to him or her is the source of the gift unless it is clear from the surrounding circumstances at the time the gift is delivered or offered that the person delivering or offering the gift is not the actual source of the gift.

“(e) Presumption of Source by Intermediaries. A person that qualifies as an intermediary as a result of a payment solicited from an official pursuant to subdivision (a)(3) may presume that he, she, or it is the source of the gift unless the person does not know or have reason to know of the official's solicitation.”

Thus, the answer to your second question is wholly dependent on the facts surrounding a specific event and the nature of the solicitation of the funds. In some cases, the lobbyist employers donating toward the tours would be considered the source of the gift and in some cases the nonprofit entity would be the source. Without additional facts we cannot provide you further guidance on this issue.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

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